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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 52

[FAC 2005-83; FAR Case 2014-017; Item V; Docket No. 2014-0017, Sequence No. 1]

RIN 9000-AM70

Federal Acquisition Regulation; Prohibition on Contracting with Inverted Domestic Corporations

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to address the continuing Governmentwide statutory prohibition on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation or any subsidiary of such entity.

DATES: Effective: **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949 for clarification of

content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-83, FAR Case 2014-017.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 79 FR 74554 on December 15, 2014, to address the continuing Governmentwide statutory prohibition (in effect through annual appropriations acts since Fiscal Year 2008) on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation (under section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or to any subsidiary of such entity. One respondent submitted comments in response to the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule.

A. Summary of significant changes.

There were no changes made to the rule as a result of the comments received. There were no comments on the Regulatory Flexibility Act.

B. Analysis of Comments:

A discussion of the comments follows:

1. Deletion of references to the specific fiscal years.

Comment: The respondent does not favor the deletion of references to the specific fiscal years covered in several subsections of FAR 9.108. The respondent states that the interim rule obscures the fact that the restrictions on contracting with inverted domestic corporations are fiscal year specific, and that those restrictions may or may not be enacted in future years. The respondent states that the interim rule now provides only a general description of the common exception language. The respondent recommends—

- o Specifically listing the covered fiscal years in the prohibition at FAR 9.108-2(a), the requirement for representation at 9.108-3, and the solicitation provision and contract clause prescriptions at 9.108-5; and

- o A separate listing at FAR 9.108-2(b) for the statutory exception for each fiscal year, e.g., for fiscal year 2008 “This prohibition does not apply when using Fiscal Year 2008 funds for any contract entered into before December 26, 2007, or for any order issued pursuant to such contract.” (This exception was then repeated for each fiscal year, inserting the date of enactment of the act).

Response: Insofar as Congress has retained the Governmentwide statutory prohibition in place since Fiscal Year 2008, this interim rule amended FAR 9.108-2, 9.108-3, and 9.108-5 to reflect the ongoing nature of the prohibition for as long as Congress extends the prohibition in its current form through subsequent appropriations action (in full-year appropriations acts and in short-term and full-year CRs).

- o Because this prohibition is enacted in annual appropriations acts, the prior format of the regulation (listing all fiscal years) required annual update of the FAR to keep adding new fiscal years. Due to the required rulemaking process, this necessitated a substantial lag between enactment of the annual appropriations act and incorporation of the current fiscal year in the regulations. With the new approach in the interim rule, the FAR will only require revision if the requirements of the new appropriations act change. The prohibition at FAR 9.108-2 does make clear that the prohibition arises from section 745 of Division D of the Consolidated Appropriations Act, 2008 (Pub. L. 110-161) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions). The Councils review the new appropriations act every year, and will take action to change the FAR if there is a change in the prohibition.

o The interim rule provides an exact repetition of the common statutory exception language. Since the exception in each appropriations act is the same, the interim rule states the exception once: i.e., "Section 745 and its successor provisions include the following exception: This section shall not apply to any Federal Government contract entered into before the date of enactment of this Act, or to any task order issued pursuant to such contract." Listing of each fiscal year exception separately was becoming repetitive and cumbersome. Whether the exception is listed separately for each fiscal year, or is just stated once, seeking legal counsel is recommended if a contractor, during contract performance, becomes an inverted domestic corporation or a subsidiary of one.

2. Recommended minimum change.

Comment: The respondent recommended, at a minimum, that language should be added at FAR 9.108-3 and 9.108-5 to limit applicability to "fiscal periods for which Congress has enacted the prohibition described in Section 9.108-2(a) above" and "When using appropriated funds from fiscal years for which Congress has enacted the prohibition described in section 9.108-2(a) above," respectively. Although this approach resolves the issue of requiring annual updates to the regulations, it imposes a burden on the many thousands

of contracting officers to determine for which fiscal periods Congress has enacted the prohibitions.

Response: The Councils have determined that this prohibition has been continuously applicable since FY 2008. As listed in the Federal Register, this required a review of 25 statutes. Not many FAR users will know which funds are tied to this restriction without further research. A contracting officer would not know whether to include the solicitation provision and contract clause without researching the appropriations act that appropriated the funds being used. It is more efficient for the Councils to make that determination, and ensure that the regulations appropriately reflect the requirement, without necessitating research by every contracting officer in the Federal Government.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant

regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA certify that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because this rule will only impact an offeror that is an inverted domestic corporation or a subsidiary of an inverted domestic corporation and wants to do business with the Government. The number of small entities impacted by this rule will be minimal. Small business concerns are unlikely to have been incorporated in the United States (or, if a partnership, established in the United States) and then subsequently incorporated in a foreign country; the major participants in these transactions are reportedly large multinational corporations. For the definition of "small business", the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: "(a)(1) Except for small agricultural

cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor”.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

List of Subjects in 48 CFR Parts 9 and 52

Government procurement.

Dated: June 18, 2015.

William Clark,
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Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 9 and 52, which was published in the Federal Register at 79 FR 74554 on December 15, 2014, is adopted as a final rule without change.

[BILLING CODE 6820-EP]

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